IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1410 of 2003

with

CRIMINAL MISC.APPLICATION No 533 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SENMA DASHRATHBHAI NENABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1410 of 2003

MR AM PAREKH FOR MR JK PARMAR for Petitioner No. 1

MR J M PANDYA APP for Respondent No. 1

2. Criminal Misc.Application No. 533 of 2004

MR AM PAREKH FOR MR JK PARMAR for Petitioner No. 1

MR J M PANDYA APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 01/03/2004

ORAL JUDGEMENT

1. Heard the learned counsel Mr. A.M.Parekh for Mr. J.K.Parmar on behalf of the appellant.

2. Present appeal has been admitted by the court on 27.1.2004. But the bail plea was to be heard today by the court. While arguing the bail plea, in response to a query raised by the court Mr. Parekh learned counsel for the appellant has fairly submitted that if the appeal is taken up for final hearing today on the point of sentence, then he is ready to argue the appeal on merit and may not press the bail plea . He further submitted that the appellant accused was tempted to file the application for bail as he was on bail pending the trial. The accused appellant has been sentenced to suffer R.I. for 7 years and therefore,if appeal is not heard, he may be enlarged on bail.

3. Mr. Pandya learned APP has also submitted that this appeal may be taken up for final hearing today.

4. Mr. Parekh has submitted that a bunch of oral as well as documentary evidence recorded by the learned Trial Judge including the copy of the charge framed, Mr Parekh has further submitted that the appeal is pressed only on the point of quantum of punishment imposed and not qua the guilt as established by the prosecution.

5. After hearing the learned counsel for the parties on merits, the following facts, according to me are very relevant, undisputedly, were not considered by the learned Trial Judge while imposing punishment for a period of 7 years on the appellant-accused.

i) At the relevant time the age of the girl was about 15 years and there are circumstances under which it can be inferred that she might have crossed the age of 15 years.

ii) No original date of birth certificate was produced by the prosecution and evidence of the prosecution rests with the production of school leaving certificate and the opinion expressed by Dr. Bhavesh who was examined by the prosecution and the opinion expressed by the dentist as to the age of the victim girl-Parul.

iii) According to the dentist the victim girl Parul was aged above 12 years and according to the x-ray taken out by Dr.Bhavesh and examined, she was probably below the age of 15 years. Considering the opinion expressed by Dr. Bhavesh during his cross examination and the fact that the x-ray plate was not sent for opinion to the radiologist, it can be legitimately inferred that the victim girl-Parul was not of a very tender age i.e. below 13 years of age.

iv) Undisputedly, this is a case of consent and the guilt has been established in the light of the definition of rape given in the section 375 IPC. It is not even found by the learned Trial Judge that the intercourse with the victim was either without consent and/or with force. As girl Parul was below 16 years of age, accused has been held guilty.

v) The victim girl has stated that the accused has stayed several days with the accused and never told the accused to leave the place where they were staying and had also not complained to any of the persons who were in the vicinity or was in the house where the victim girl was staying with the accused. It is not the case of prosecution that victim was forcefully confined.

vi) The age of the accused is also relevant. It is submitted by Mr. Parekh that on the date of the offence the accused was of 18-1/2 to 19 years. So it is likely that anxiety and lack of sex education of teenaged girl may have resulted into a serious criminal wrong. The quantum of punishment should not be harsh and that too a man of tender age, in such case. An accused with no other criminal background may come out of the jail as a hardened criminal if he is asked to stay with such a group for several years. The social impact of conviction and quantum of punishment are two relevant aspects . But we should not forget that they are distinct and different from each other. The imposition of minimum punishment should not be mechanical but rational when the convict is a teenager is convicted on the say of a witness accomplish.

6. Mr. Parekh has rightly placed on a decision of this court reported in 1991 (2) GLR 1243 in the case of

Budhio Chhaganbhai Vaghri vs. State of Gujarat .The ratio of this decision squarely applies to the facts of the present case.

7. The facts of the decision cited also reveals that on the date of the offence the accused was of 19 years of age. The date of birth of the accused was not available on record, but a reasonable inference was drawn from the facts available on record. In the cited decision also this court has referred to the statement recorded under section 313 Cr.P.C. and age mentioned in the committal proceedings.

8. In the present case, the offence was committed in the month of May/June 2002 and on the date on which the statement came to be recorded under section 313, he has stated his age as 20 years.

9. It is not the say of prosecution that the accused was a married man having settled in life, even then the accused has enticed away a young girl of about 15 years. The young girl, on a call given by the accused had readily boarded in a jeep car hired by the accused and left the shelter of her parents. Her conduct is correctly appreciated by the learned Trial Judge. When the learned Trial Judge has acquitted the accused for offence punishable under section 363 IPC, he could have imposed much lesser sentence than imposed by assigning cogent and convincing reasons. It is true that for the offence under section 376 IPC, the minimum punishment prescribed is of 7 years, but it was open for the learned Trial Judge to impose less than the minimum punishment by assigning reasons.

10. The learned Trial Judge could have given the above said reasons referring the decision cited before this court today and other decisions which have been referred to by the bench in the cited decision for awarding sentence less than the minimum prescribed.

11. Mr. Parekh insisted and submitted that this court should reduce the substantive sentence from 7 years to 2 years. The resistance of the learned APP on this point is also considered by me. Therefore, I am of the view that if the substantive sentence of 2-1/2 years, if is imposed in the present case, it would serve the purpose and same would meet the ends of justice.

12. In the circumstances the conviction recorded by the learned Trial Judge is upheld. However, the substantive sentence imposed on the accused is reduced to

2-1/2 (two and half) years. While awarding the sentence, the fine imposed if not paid, sentence imposed in default, remains unaltered. However, considering the age of the accused, the State should see that the appellant accused is kept in a prison wherein hardened criminals are not kept

13. Accordingly the appeal is partly allowed.

14. In view of the disposal of the main criminal appeal, no order is required to be passed in Cri.Misc.Application No.533 of 2004. Hence the same is disposed of.

(C.K.Buch-J)

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